SUPREME COURT, U. S.
FILED
FEB 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE GAS LINE CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH M. WELLS,
PAUL E. GOLDSTEIN,
HARRY L. ALBRECHT,
PAUL W. MALLORY,
Suite 2014,
122 South Michigan Avenue,
Chicago, Illinois 60603,
(312) 431-7550,
Attorneys for:
Natural Gas Pipeline Company of America.

February 19, 1974.

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
The Opinion Below	5
Reasons for Granting the Writ	6
A. The Decision of the Court of Appeals Conflicts with the Decision of the Court and of Other Circuits or Relative Functions of Court and Commission	7
B. The Commission Properly Made the Settlement Agreement Dispositive Where the Comparative Need of the Two Pipelines Was Approximately Equal	9
C. The Decision of the Court of Appeals Will Impede the Commission in Fulfilling Its Duties Under the Act	12
D. The Court of Appeals Erred in Rejecting the Standard of Unequivocal Public Necessity Adopted by This Court	13
Conclusion	16
Appendix:	
A. Initial Decision of the Court of Appeals	A1
B. Decision of the Court of Appeals Granting Clarification and Denying Remaining Motions	A12
C. Opinion No. 655	A16
D. Order Denying Rehearing and Partial Stay	A31

CITATIONS.

Cases.

Allentown Broadcasting Corp. v. F. C. C., 222 F. 2d 781 (D. C. Cir. 1954) *rvsd. sub nom.* F. C. C. v. Allentown Broadcasting Corp., 349 U. S. 358 (1955) 6-7, 10-11

Anderson Power and Light of the City of Anderson, Indiana v. F. P. C., 481 F. 2d 490 (D. C. Cir., 1973) .... 14 (fn. 4)

Argo Oil Co., 20 FPC 208 (1958) 3

City of Chicago v. F. P. C., 385 F. 2d 629 (D. C. Cir., 1967) .... 14 (fn. 5)

F. P. C. v. Louisiana Power & Light Co., 406 U. S. 621 (1972) .... 12 (fn. 3)

F. P. C. v. Transcontinental Gas Pipe Line Co., 365 U. S. 1 (1961) 8

Michigan Consolidated Gas Co. v. F. P. C., 283 F. 2d 204 (D. C. Cir.), cert. den. 364 U. S. 913 (1960) 4, 5, 6, 8, 9, 10

National Coal Assn. v. F. P. C., 247 F. 2d 86 (D. C. Cir., 1957) 9

Pennsylvania Gas and Water Co. v. F. P C., 453 F. 2d 1242 (D. C. Cir., 1972) 12

Permian Basin Area Rate Case, 390 U. S. 747 (1968) .. 7, 14

Public Service Commission of the State of New York v. F. P. C., 463 F. 2d 824 (D. C. Cir., 1972) 8, 13

Public Service Commission of the State of New York v. F. P. C., 467 F. 2d 361 (D. C. Cir., 1972) 13

Texas Eastern Transmission Corp. v. F. P. C., 306 F. 2d 345 (5th Cir., 1962) .... 14 (fn. 5)

United Gas Pipe Line Co., Docket No. CP73-117 12

United States Statutes.

Natural Gas Act, 15 U. S. C. 717 *et seq.*
§ 7(b), 15 U. S. C. 717f(b) ..... passim
§ 7 generally, 15 U. S. C. 717f 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The initial opinion and order of the Court of Appeals and its opinion and order granting clarification and denying remaining motions are not yet reported, but are set forth as Appendices A and B, respectively, of this Petition. The initial opinion (No. 655) of the Federal Power Commission and its Opinion Denying Rehearing and Partial Stay are set forth as Appendices C and D, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1973. A petition for rehearing filed by Petitioner was denied on November 21, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. 717r(b).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that "primary importance" must be given to the comparative needs of two pipelines, where substantial evidence showed the comparative need to be approximately equal, and thereby improperly substituted its judgment for the judgment of the agency that other factors, *e.g.*, long-standing contracts, agency-approved settlement, equitable considerations, were dispositive in a proceeding involving the abandonment of natural gas sales to one pipeline and certification of the sale of that natural gas to another pipeline.

STATUTE INVOLVED

Section 7(b) of the Natural Gas Act (Act), 52 Stat. 824, 15 U. S. C. 717f(b), reads as follows:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Relevant here is that part of Section 7(b) providing for abandonment where permitted by the "present or future public convenience or necessity."

STATEMENT

In 1952, both Transcontinental Gas Pipe Line Corporation (Transco) and Texas Illinois Natural Gas Pipeline Company, predecessor to Natural Gas Pipeline Company of America (Natural or Petitioner) were purchasing gas from the La Gloria Field, Jim Wells and Brooks Counties, Texas. During 1953, producers in that field began to reduce deliveries to Natural after a dispute over contract rights and sought to terminate their contracts with Natural. Natural filed complaints with the Federal Power Commission (Commission) against these producers, seeking restoration of deliveries, and the Commission issued show cause orders against the producers. These proceedings were consolidated in *Argo Oil Company, et al.*, Docket Nos. G-2950, *et al.* Transco, recognizing the possible prejudice to its status as a purchaser in the La Gloria Field, intervened.

The Commission held that the producers, in order to terminate deliveries to Natural, must seek abandonment under Section 7(b) of the Act (15 FPC 622). While an appeal of this decision was pending, the parties to the *Argo* proceeding agreed to a settlement of all issues. No party, including Transco, objected to the settlement. Approval by the Commission of this settlement terminated the proceeding [20 FPC 208 (1958)].[1]

In the *Argo* settlement, Natural agreed to accept reduced deliveries from the La Gloria Field until April 1, 1971, when Transco's contract to purchase 81,000 Mcf per day in the La Gloria Field expired. In exchange, the producers dedicated to Natural all reserves in the La Gloria Field subject only to existing contracts, including Transco's. Essentially, Natural was to accept reduced deliveries for the term of other existing purchase contracts in order to obtain larger volumes of gas later.

1. Commission action in *Argo* is found at 14 FPC 597, 598, 624 (1955); 15 FPC 601, 622, 1221 (1956); and 20 FPC 208 (1958).

On January 18, 1971, Mobil, operator of the La Gloria Field, petitioned the Commission for abandonment of sales to Transco and certification of sales to Natural, effective April 1, 1971, when Transco's contract expired. Other producers followed suit. The abandonment proceedings were consolidated in *Hilda B. Weinert and Jane W. Blumberg, et al.*, Docket Nos. G-2730, *et al.* (J. A. 45-54). Transco, Natural and certain of their customers were allowed to intervene.

Hearings were conducted from October 8, 1971 through October 19, 1971 (R. 1-1277), after which, on June 2, 1972, the Examiner rendered an Initial Decision denying abandonment (J. A. 55-105). The initial decision relied on the "comparative need" test of *Michigan Consolidated Gas Co.* v. *F. P. C.*, 283 F. 2d 204 (D. C. Cir.); *cert. den.*, 364 U. S. 913 (1960) (J. A. 85) in holding that Natural had not shown a greater need and that the possible effect on Transco's customers of abandonment was "more substantial" than the effect of denial of abandonment on Natural's customers. The Examiner did not quantify his conclusion, however, and it is clear from the elements found favorable to Natural that the Examiner found the relative needs were quite evenly balanced. The Commission's Staff urged before the Examiner (and later the Commission) that Natural had shown the greater need for the gas.

The Commission, in Opinion No. 655 issued March 21, 1973, reversed the Examiner's decision, thereby permitting abandonment of service to Transco and granting certification of sales to Natural (Appendix C). The Commission viewed the standard of public convenience and necessity broadly, emphasizing that the gas reserves in question would remain in interstate commerce by certification under the public convenience and necessity standards of Section 7(e). After noting the importance of the Commission-approved settlement of 1958, which assured Transco of its contract volumes of gas while contemplating that Natural's reduction in volumes would be made up by deliveries after the Transco contract had expired, the Commission held that sole

reliance on the comparative need test by the Examiner precluded "consideration of the totality of 'public convenience and necessity' which is ours to weigh." Emphasizing the importance of contracts and settlement in the particular facts of this case, the Commission stated that Transco had the opportunity to show a need for abrogation of the Natural contract and an extension past term of its own contract, and failed to do so. The Commission concluded by pointing out that, given the short supply of both pipelines, reduction in service to the ultimate consumers of whichever pipeline failed to receive the gas reserves in question would result (App. C, p. A27). Rehearing was denied (Appendix D).

Transco and others appealed to the Court of Appeals for the District of Columbia Circuit. That court on November 12, 1973 issued an opinion and order vacating the Commission's Opinion No. 655 and remanding to the Commission for further proceedings (Appendix A). Rehearing was denied November 21, 1973. It is the November 12th Opinion and Order of the Court of Appeals which is the subject of this Petition.

THE OPINION BELOW

In vacating and remanding the Commission's Opinion No. 655, the affirmative statement of guiding principle by the court below is found in its concluding section (App. A, A10-11). There the court pointed to its *Michigan Consolidated* decision (*supra*), relied upon by the Examiner and discussed and distinguished by the Commission on rehearing (App. D, A32-33), and to the holding that judicial review is sufficiently broad to order consideration of factors "ignored" by an agency which are relevant to the public interest. Continuing, the court stated that "[p]rimary importance must be given to a broadly conceived comparison of the needs of the two natural gas systems", and concluded by listing several factors to be considered on remand as part of a "balancing process."

Negatively, the court below held that the Commission found *Michigan Consolidated* (*supra*) inappropriate in this case and gave controlling weight to the settlement absent compelling public interest proof to the contrary. The Commission, the court said, "failed to perceive that the fact that all need gas does not mean that all need it equally." (App. A, p. A8).

REASONS FOR GRANTING THE WRIT

The court below has simply and plainly substituted its judgment for that of the Commission. Both court and Commission say much the same thing on specific issues. The Commission, well aware of the *Michigan Consolidated* decision (*supra*), held that the Examiner, in placing virtually exclusive reliance on the comparative need test, improperly precluded broad consideration of the public convenience and necessity; the court said its comparative need test was not restrictive, but then held that primary importance must be given to comparative need. What the court below has done is to usurp the judgment of an expert administrative agency by requiring that agency to grant primary importance to one test after the agency, based on substantial evidence, had found that test to be indecisive.

The court below was too rigid in applying its *Michigan Consolidated* criteria to a factually disparate abandonment case; the public convenience and necessity test and finding required of the Commission is too subtle, elusive and varied to be reduced to formulae of general applicability. It is largely a matter of agency discretion, which the court below failed to recognize. There is nothing in the public convenience and necessity provision of Section 7(b) of the Act requiring the Commission to give "primary importance" to any one specific factor.

This Court's decision in *F. C. C.* v. *Allentown Broadcasting Co.*, 349 U. S. 358 (1955), affords substantial guidance and was not followed by the court below. There this Court held that,

where important factors an agency must consider in a comparative hearing leave little to choose between competing claimants, the agency may turn to other considerations as decisive, which action the court found to be within the agency's "allowable area of discretion." (349 U. S. at p. 362)

A. The Decision of the Court of Appeals Conflicts with the Decisions of this Court and of Other Circuits on Relative Functions of Court and Commission.

The decision of the Court of Appeals contravenes the uniform view taken by this Court of the allocation of powers and functions between the Commission and courts under the Act. Courts, on review, examine whether conclusions of the Commission are based on substantial evidence in the record and whether the Commission has complied with the Act. They do not, however, overrule the Commission on its policy choices exercised within the parameters of its jurisdiction.

The most important and pertinent statement of this Court on the Commission's powers is found in the *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968). In that decision, this Court, *inter alia*, approved the use by the Commission of area rate regulation rather than individual producer rate regulation. This Court there stated:

> More important, we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of the reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' FPC v. Hope Natural Gas Company, supra, at 602. . . . (390 U. S. at 767)

Regulation with respect to allocation of gas supplies under Section 7 of the Act is one of the regulatory functions vested in the Commission; *Michigan Consolidated Gas Co.* v. *F. P. C.*, 203 F. 2d 895 (3d Cir., 1953). There, a pipeline customer challenged the pipeline's failure to allocate to it any of the increased capacity for which the pipeline had sought and received a Section 7 certificate from the Commission. The court stated that:

> The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence. Judicial review of the Commission's orders with respect to this question is, we think, limited by the rule as to the review of rate orders laid down by the Supreme Court in Federal Power Comm. v. Natural Gas Pipeline Company, 1942, 315 U. S. 575, 586 . . . as follows: 'Agencies to whom this legislative power has been delegated are free within the ambit of their statutory authority to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.' (203 F. 2d at 900)

This Court has also held that, in considering whether to certificate transportation of gas by interstate pipeline for direct industrial customers, it is within the Commission's discretion under Section 7 to weigh the effect of the transportation on the Commission's policies regarding the use of gas, even though the Commission has no power to regulate the ultimate use directly; *F. P. C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1 (1961). However, the particular weight to be given policies with respect to end use is a question for the Commission. "In different certificate applications, the factor of end use will have varying importance." *Public Service Commission of New York* v. *F. P. C.*, 463 F. 2d 824, 826 (1972).

Evaluation of the public interest is a function of the Commission and committed to its judgment, *National Coal Association* v. *F. P. C.*, 247 F. 2d 86, 89 (D. C. Cir., 1957). The task of weighing the relative importance of elements constituting the public convenience and necessity is delegated to the Commission and not the courts.

Here the court below plainly failed to follow the teachings of these cases. It did not defer to the expert judgment of the Commission, and improperly erected and imposed unreasonable requirements at odds with the discretion entrusted by Congress to the agency.

B. The Commission Properly Made the Settlement Agreement Dispositive Where the Comparative Need of the Two Pipelines Was Approximately Equal.

Comparative need is an element in this case in determining public convenience and necessity. However, nothing in the Act mandates that comparative need is to be considered to the exclusion of all other factors. Yet the Examiner (J. A. 85) and the Court of Appeals (App. A, pp. A6-10) were so entranced with the comparative need standard that all other factors were relegated to make-weight status. Reliance for this standard was placed on *Michigan Consolidated Gas Co.* v. *F. P. C.*, 283 F. 2d 204 (D. C. Cir.), *cert. den.* 364 U. S. 913 (1960). The court there approved the Commission's application of a comparative need standard in the circumstances of that case; however, the court could not bind the Commission to any rigid standard of universal applicability, as the Examiner and Court of Appeals apparently believe.

The Commission appropriately relied on factors other than comparative need to dispose of this case, since it was fully aware of the great need of both pipelines for the gas supply in question, a need that was about equal. With data available to it at the outset of the hearing and relying on its expertise, the Com-

mission was able to recognize that comparative need was not a controlling element (J. A. 49). Nevertheless, substantial evidence was received in the hearing bearing on the comparative need of the pipelines, and no proffered evidence on this point was excluded.

The Examiner's 50-page decision, while concluding that Natural had not demonstrated greater need for the gas, made numerous other findings which reveal that the impact on each pipeline would not differ greatly. Neither pipeline would benefit or suffer financially more or less than the other by the outcome of the case (J. A. 100). Natural's supply deficiency, expressed as a percentage of annual requirements, was greater than Transco's (J. A. 63, 69). Existing customers of the distribution companies which presented evidence at the hearing would not be put in jeopardy by grant or denial of the abandonment (J. A. 98). The Commission's Staff contended that Natural had the greater need for the gas. Thus, the Commission, having reviewed the Examiner's decision, concluded that need was not a controlling element in the case (App. C, pp. A26-27). On rehearing, the Commission directly discussed the Michigan Consolidated case, and held that its determination was not inconsistent with that case (App. D, pp. A32-33).

Where important factors an agency must consider in a comparative hearing leave little to choose between competing claimants, it has been held that the agency may hold other considerations decisive. In *Allentown Broadcasting Corp.* v. *F. C. C.*, 222 F. 2d 781 (D. C. Cir., 1954), the court reviewed a decision of the Federal Communications Commission (FCC) involving mutually exclusive applications to construct radio stations to serve two neighboring communities. The FCC had made findings that the needs of the two communities and the ability of the two applicants to serve the respective communities were almost equally balanced, that "slight differences between the two . . . fairly well cancelled out" and that " 'there is little room for choice between the two communities.' " (222 F. 2d at

783.) In light of the near equivalence of these factors, the FCC based its decision instead upon the fact that one community had only one station and the policy that residents should be given a choice in programming.

The Court of Appeals acknowledged the validity of the legal proposition formulated by the FCC but reversed because the findings on near equivalence of comparative ability to serve the respective communities did not appear to the court to be supported by substantial evidence on the record. The Supreme Court, in turn, reversed the Court of Appeals. It disagreed with respect to the substantial evidence issue. It also held that, even in the absence of near equivalence with respect to the "ability to serve" issue, it was within the FCC's discretion (given near equivalence in need) to make choice in programming decisive; *FCC* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 361-62 (1955).

Allentown demonstrates that an agency is not necessarily wedded to decision based on any one factor in a comparative inquiry and, more importantly, that the reviewing court is not to substitute its judgment for that of the agency on the relative importance of a policy factor. When a factor such as comparative need or ability to serve, however important, does not really distinguish two competing applicants, the agency may turn to factors which might not be decisive in the context of a significant difference in comparative need.

Allentown (together with the cases cited in Section A) fully supports the Commission's decision in Opinion No. 655. The Commission concluded, given the insignificant difference in comparative need, that the policy of honoring settlement agreements should control.

The Commission explained its reasons for favoring this factor—the desirability of enhancing long-range planning and contract stability and of encouraging settlement agreements. Such agreements are also necessary administratively to the Commission's performance of its burdensome tasks,

as recognized by the D. C. Circuit in *Pennsylvania Gas and Water Company* v. *F. P. C.*, 453 F. 2d 1242 (D. C. Cir., 1972). Obviously, the Commission should not be required to go to almost infinite lengths to hold further hearings for the purpose of expanding the record on comparative need and deciding a factual question with metaphysically precision when it is clear that there is substantial equivalence in need.[2] Rather, it may recognize the truly significant factors and accord them proper weight—a task it accomplished in Opinion No. 655.

C. The Decision of the Court of Appeals Will Impede the Commission in Fulfilling Its Duties Under the Act.

The Opinion of the Court of Appeals, by overruling the Commission's policy determination, has unduly restricted its authority under the Act generally and deprived it of an important tool in dealing with the current gas shortage.

The ability of the Commission to establish policy for the natural gas industry is crucial, particularly during this period of gas shortage[3] when the Commission is attempting to cope with conditions unprecedented in the regulatory history of the natural gas industry. The Commission, facing this abrupt and unanticipated challenge to the adequacy of its traditional regulatory methods, has utilized a number of experimental methods for allocating available gas and alleviating the supply shortage. For example, the Commission is currently attempting to utilize the abandonment provision of the Act to allocate scarce gas supplies in *United Gas Pipe Line Company*, Docket No. CP73-117. In light of this present situation, any inroads upon the Congressional delegation of power to the Commission are undesirable.

---

2. We agree with the court below that "the fact that all need gas does not mean that all need it equally." (App. A, p. A8.) But this exercise in logic must be leavened with the realization that the importance of comparative need diminishes as the difference in need diminishes.

3. Recognized by this Court in *F. P. C.* v. *Louisiana Power & Light Co.*, 406 U. S. 621, 626 (fn. 2) (1972).

The broad impact of the gas shortage on the public interest mandates that the Commission not be handcuffed in fleshing out Section 7(b) or other provisions of the Act and making the pragmatic adjustments required to meet these new conditions now evolving within the industry.

The FPC may not be able to gauge precisely the effect that its failure to honor settlement agreements will have on the pipelines' long-term supply programs. However, absent abuse of discretion, it is the Commission to which is delegated the task of weighing the probable effect of its policies and balancing competing interests—not the Court of Appeals. See *Public Service Commission of the State of New York* v. *F. P. C.*, 463 F. 2d 824, 828 (D. C. Cir., 1972); *Public Service Commission of the State of New York* v. *F. P. C.*, 467 F. 2d 361, 369 (D. C. Cir., 1972).

For the Commission to act effectively to allocate limited gas supplies and to augment the short gas supply, it is necessary that the Commission be able to respond to new conditions. The Act contains the necessary flexibility, for the standard of public convenience and necessity has no precise, static content. It is the Commission which determines that content in the context of particular factual situations. However, the Court of Appeals' decision in this case destroys the possibility of effective regulatory action. This is true if the court's decision is considered only as an interpretation of Section 7(b) of the Act. This observation is even more valid if the court's decision has broader applicability, signaling greater intervention by the courts, fettering the Commission in exercising all the regulatory functions committed to it by the Act.

D. The Court of Appeals Erred in Rejecting the Standard of Unequivocal Public Necessity Adopted by This Court.

The Commission reasoned in Opinion No. 655 that the contracts made pursuant to the Commission-approved settlement agreement should be honored by it absent circumstances of

"unequivocal public necessity" (App. C, p. A27). The Court of Appeals completely rejected this standard as inappropriate for a Section 7(b) proceeding. This disposition by the Court of Appeals conflicts with the structure of the Act developed by this Court in the *Permian* case. This Court there stated that the regulatory system is premised on private contractual arrangements which are not to be abrogated absent "unequivocal public necessity" (390 U. S. at 822).

Contrary to the indication of the court below (App. A, p. A9, fn. 11), *Permian* was not relied on by the Commission "out of context", as demonstrated by the passage quoted by the court. The Natural Gas Act is "premised" on contractual arrangements, and the statement is not limited to rate sections to the exclusion of any other section. The difference in the cases as between rates and abandonment merely reflects the application of a principle to different circumstances; it does not call for an alteration of the principle.[4] *Permian* requires an "unequivocal"— *i.e.*, clear—showing that some factor of public interest (such as relative need) would be disserved. Thus, the Commission was fully justified in calling for a clear showing of public necessity, and was further justified in concluding that the numerous other factors developed on the record and ruled on by the Examiner did not, in balance, amount to such a clear showing.

The importance of settlements must also be considered, and the policy in favor of supporting agency-approved settlements.[5] The Commission was fully entitled, within the ambit of its delegated discretionary authority and specialized knowledge, to place dispositive reliance on contract and settlement, absent

4. The court below has recently recognized the importance of private contractual agreements; *Anderson Power and Light of the City of Anderson, Indiana* v. *F. P. C.*, 481 F. 2d 490 (D. C. Cir., 1973).

5. See *Texas Eastern Transmission Corp.* v. *F. P. C.*, 306 F. 2d 345 (5th Cir., 1962); *City of Chicago* v. *F. P. C.*, 385 Fd 2d 629 (D. C. Cir., 1967).

significant countervailing considerations, and, under these circumstances, the court below erred in substituting its judgment for that of the Commission.

The court below, in its attempt to force the concepts of public convenience and necessity into a rigid standard, also demonstrates a lack of understanding of the realities of the natural gas industry. A principal example is its reference to the "presumption in favor of continued service" (App. A, p. A11). This presumption certainly would have application if a pipeline, at the end of its contract term, sought to abandon service to a distribution company, the latter lacking economic resources and reasonable access to an alternative supply of gas. Here two large pipelines are involved, each having numerous suppliers in various supply areas, who program deliveries and budget expenditures in reliance on contracts and settlements. The Commission, in recognizing the need for a contract stability (App. A, pp. A26-27), was, in fact, creating a regulatory climate which would help insure adequate service rather than uncertainty, which would undermine long-range planning. Therefore, the court's rationale for overturning the Commission's reliance on the settlement is not well founded. Certainly, any notion of a presumption in favor of continued service has little meaning here.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. WELLS,
PAUL E. GOLDSTEIN,
HARRY L. ALBRECHT,
PAUL W. MALLORY,
Suite 2014,
122 South Michigan Avenue,
Chicago, Illinois 60603,
(312) 431-7550,
Attorneys for:
Natural Gas Pipeline Company of America.

APPENDIX A

INITIAL OPINION OF THE COURT OF APPEALS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 73-1410

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
THE BROOKLYN UNION GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MONSANTO COMPANY
CITY OF CHICAGO, A MUNICIPAL CORPORATION
MOBIL OIL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK

No. 73-1412

PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE BROOKLYN UNION GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MOBIL OIL CORPORATION
MONSANTO COMPANY
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
CITY OF CHICAGO, A MUNICIPAL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY

No. 73-1558

ASSOCIATED GAS DISTRIBUTORS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

NORTHERN ILLINOIS GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
MARATHON OIL COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK
TRANSCONTINENTAL GAS PIPELINE CORPORATION
CITY OF CHICAGO

No. 73-1575

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

NORTHERN ILLINOIS GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND
NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
ASSOCIATED GAS DISTRIBUTORS
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
MOBIL OIL CORPORATION
MARATHON OIL COMPANY
CITY OF CHICAGO
TRANSCONTINENTAL GAS PIPE LINE CORPORATION, INTERVENORS

Petitions for Review of Orders of the Federal Power Commission

---

Decided November 12, 1973

Thomas F. Ryan, Jr., with whom *Robert G. Hardy* and *Lawrence H. Gall* were on the brief, for Transcontinental Gas Pipe Line Corporation.

Richard A. Solomon with whom *Peter H. Schiff*, General Counsel, was on the brief for Public Service Commission for the State of New York. *Michael H. Rosenbloom* also entered an appearance for the Public Service Commission for the State of New York.

John Frederick Moring and *Richard G. Morgan* were on the briefs for Associated Gas Distributors.

William I. Harkaway and *Robert A. Froehlch* were on the briefs for Consolidated Edison Company of New York, Inc., Petitioners in No. 73-1575.

William M. Sawyer, Attorney, Federal Power Commission with whom *Leo E. Forquer,* General Counsel, and *George W. McHenry, Jr.,* Solicitor, were on the brief, for respondent.

Paul E. Goldstein was on the brief for Intervenor, Peoples Gas Light and Coke Company and Natural Gas Pipeline Company of America.

Barbara M. Gunther and *Joseph P. Stevens* were on the brief for the Intervenor, The Brooklyn Union Gas Company in Nos. 73-1410 and 73-1412.

Mark Goldstein was on the brief for the Intervenor City of Chicago.

J. Stanley Stroud was on the brief for the Intervenor, Northern Illinois Gas Company.

Thomas P. Hamill was on the brief for the Intervenor, Mobil Oil Corporation.

Philip R. Ehrenkranz and *Carroll Gilliam* also entered an appearance for Intervenor, Mobil Oil Corporation.

William A. Sackmann entered an appearance for Intervenor, Marathon Oil Company.

Richard F. Generelly entered an appearance for Intervenor, Monsanto Company.

Before: WRIGHT, ROBINSON and MACKINNON, *Circuit Judges.*

PER CURIAM: This case involves petitions to review orders of the Federal Power Commission (the Commission) granting abandonment of natural gas supplies in the context of a critical nation-wide fuel shortage. As such, it raises important issues relating to the proper standard to be applied in natural gas abandonment proceedings for the foreseeable future. All parties

to this controversy agree that an early determination of the issues is necessary and this court has acted accordingly.[1]

I

The facts of this case are fully stated in the Presiding Examiner's Initial Decision;[2] we only summarize here those necessary to understand the precise issues decided. Petitioner, Transcontinental Gas Pipe Line Corporation (Transco), and intervenor Natural Gas Pipeline Company of America (Natural), are natural gas pipelines engaged in the transportation and sale of natural gas in interstate commerce.[3] Transco and Natural have purchased natural gas production from the La Gloria field area in Texas since the late 1940's and early 1950's respectively. In the middle 1950's, the La Gloria producers contended they could not continue to meet the requirements of both companies and still have adequate gas for other needs. For this reason the producers attempted to discontinue service to Natural by invoking certain "escape clauses" in their contracts. Pending court review of a Commission decision[4] disallowing the proposed discontinuance, the producers and Natural agreed upon a settlement of the controversy. The settlement agreement, as approved by the Commission,[5] provided for a substantial reduction in deliveries to Natural and the continued delivery of 81,000 Mcf per day[6] to Transco until its contract with the producers expired

1. Scheduling of oral argument in this case has been expedited twice and the opinion rendered expeditiously because of the urgency for a speedy decision.

2. Hilda B. Weinert, 49 FPC —— (June 2, 1972) (Presiding Examiner's Initial Decision); J. A. at 55.

3. Transco serves the Atlantic Seaboard, including New York City; Natural serves the Midwest, including Chicago. *Id.*

4. Argo Oil Corp., 15 FPC 622 (1956).

5. Argo Oil Corp., 20 FPC 208 (1958).

6. [T]he average customer using gas for winter residential space heating in the market area in question uses 1½ Mcf/d (M=thousand, c=cubic, f=feet, d=day). Hilda B. Weinert, 49 FPC ...., ... (June 2, 1972) (Presiding Examiner's Initial

in 1971. The quid pro quo for acceptance by Natural of the reduced deliveries was a contract with the producers that dedicated all the natural gas reserves in the La Gloria Field to Natural and required the producers to seek abandonment of deliveries of the 81,000 Mcf per day to Transco when its contract expired.[7] Although Transco was not a party to the settlement agreement, it had intervened in the original proceeding before the Commission.

In early 1971 after Transco's contract expired, the La Gloria producers filed applications with the Commission to abandon sales to Transco. These applications were consolidated and hearings were held in the fall of 1971. The Comission, reversing the decision of the Presiding Examiner, granted the applications for abandonment and certificated the sale of the abandoned gas to Natural. Thus Natural presently is receiving the 81,000 Mcf per day formerly delivered to Transco. Upon denial of its request for a rehearing before the Commission, Transco filed the instant petitions for review with this court. We vacate the orders of the Commission, restore the parties to the status quo ante, and remand the case to the Commission.

II

Based upon an extensive and careful review of the evidence, the Presiding Examiner found, *inter alia,* that Transco had greater need for the La Gloria field gas than Natural. Accordingly, he denied the application for abandonment pursuant to the comparative need standard enunciated by this court in *Michigan Consolidated Gas Co.*, v. *FPC*, 108 U. S. App. D. C. 409, 283 F. 2d 204, *cert. denied,* 364 U. S. 913 (1960). On review, the Commission reversed the Examiner's decision,

Decision); J. A. at 57. Thus the 81,000 Mcf per day of natural gas contested in this case is sufficient to meet the needs of approximately 54,000 residential households.

7. Thus, if abandonment were approved, Natural would receive the volumes of natural gas formerly delivered to Transco.

ordered abandonment and certificated sale of the gas to Natural. In its decision the Commission stated that the comparative need standard[8] was not appropriate in the context of this case, which involves: (1) a critical natural gas shortage in all areas of the country, (2) the expiration of Transco's contract with the La Gloria producers, and (3) Natural's contract rights to the gas under the 1958 Commission approved settlement agreement. For these reasons the Commission formulated a new standard that would give controlling weight to the settlement agreement absent "compelling proof" of countervailing "unequivocal public necessity."

III

Section 7(b) of the Natural Gas Act, 15 U. S. C. § 717 f(b) (1970), provides that abandonment of natural gas facilities or services subject to the Commission's jurisdiction can be granted only "after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment." In *Michigan Consolidated, supra* at 419, 283 F. 2d at 214, this court, in considering the criteria for abandonment under § 7(b), recognized two important principles: (1) a pipeline which has obtained a certificate of public convenience and necessity to serve a particular market has "an obligation, deeply embedded in the law, to continue service," and (2) the burden of proof is on the applicant for abandonment to show that the "public convenience and necessity" permits abandonment, that is, that the public interest "will in no way be disserviced" by abandonment.

The fundamental tenets established by *Michigan Consolidated* are that the public interest is the ultimate criterion under § 7(b)

8. In its Order Denying Rehearing and Partial Stay, J. A. at 151, 152, the Commission stated that the comparative space heating saturation test employed in *Michigan Consolidated* is not appropriate to the facts of this case. Although the Commission failed to explain why this is so, it erred more fundamentally in not recognizing that the public interest requires a more broadly conceived comparison of need than it made in this proceeding. *See* note 13 and accompanying text, *infra*.

and that all factors relevant to the determination of which course of action best promotes the overall public interest must be fully considered. The Commission there proposed, and this court accepted, a comparative needs test which balanced the relative needs of the competing pipelines and their ultimate consumers as the principal index of the public interest.

Against these principles of statutory and case law, it is clear that the Commission's orders cannot stand. At bottom, the Commission's decision stands for the simple proposition that where all parties need contested gas supplies the party having a contractual right to such gas will prevail. This proposition possesses the alluring qualities of simplicity and precision; inded, it seems to have so mesmerized the Commission that it abdicated its statutory responsibility to guarantee that the overall public interest "will in no way be disserviced" by abandonment. Simply stated, the Commission apparently failed to perceive that the fact that all need gas does not mean that all need it equally.[9] The approach thus taken failed to consider adequately and fully all the factors relevant to an intelligent determination of the overall public interest.

The Commission also erred in according dispositive weight to private, albeit Commission approved,[10] contractual arrange-

9. In the instant proceeding, both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to either pipeline will result in a diminution of its ability to continue even current levels of service. Under these circumstances, we find no showing of unequivocal public necessity for abrogating the contracts of the parties.
Hilda B. Weinert, 49 FPC ...., ... (Opinion No. 655, March 21, 1973); J. A. at 107, 118. The Commission never adequately refuted the Examiner's finding that Transco had the greater need for the natural gas.

10. A finding by the Commission that a settlement resolving an immediate controversy would be in the public interest in 1958 cannot be construed to be sufficiently binding to preclude or restrict in any sense a new and comprehensive determination of the public interest as it exists in 1973. Indeed, the Commission itself apparently recognized this in its order approving the 1958 settlement:

(Continued on Next Page)

ments absent a showing of countervailing "unequivocal public necessity."[11] The Commission essentially argues that failure to honor long term gas acquisition contracts would be "disastrous since no pipeline would be able to plan for the future."[12] Clearly there are advantages to insuring as great certainty in gas acquisition plans as is possible. Moreover, if such plans and contracts are not given significant weight, then a pipeline in

---

> Nothing contained herein shall be construed as a waiver of the requirements of Section 4 or 7 of the Natural Gas Act, or of the Commission's regulations thereunder, and is without prejudice to any finding or orders which have been or may hereafter be issued by the Commission in any proceeding now pending or hereafter instituted by or against any of the parties to these proceedings.

Argo Oil Corp., 20 FPC 208, 210 (1958).

11. The Commission focused on language quoted out of context from *Permian Basin Area Rate Cases*, 390 U. S. 747, 822 (1968):

> The regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.

Permian, of course, involved rate regulation and did not consider the sanctity of private contracts in the context of abandonment proceedings under § 7(b). The situation confronting the Court in *Permian* involved producers who were dissatisfied with their contract prices which were not as high as would be permissible under the maximum area rates subsequently fixed by the Commission. The decision holds that such "improvident bargains" could not be relieved absent injury to the public interest, such as impaired ability to maintain adequate service to the consuming public.

In the instant abandonment proceeding, loss of the La Gloria gas will directly result in further curtailment of existing service to present customers of the losing pipeline. The public interest is jeopardized and "unequivocal public necessity" is demonstrated whenever private contracts substantially impair the ability of a pipeline to maintain adequate levels of service to its customers. In this situation, contract rights should be considered as but one of the important factors to be weighed in the balancing process set forth in this opinion.

12. Hilda B. Weinert, 49 FPC ——, —— (Opinion No. 655, March 21, 1973); J. A. at 107, 117.

Transco's position might not be inclined, or at least would not have as great an incentive, to seek new sources of supply to replace those lost upon expiration of its contracts. Thus it is conceded that private, long term contracts, at least where they are part of a Commission approved settlement agreement, must be accorded significant weight in the determination of the overall public interest. But to argue that anything less than controlling weight would be "disastrous" grossly overstates the case. Rigid deferral to contractual arrangements without a searching inquiry into other factors relevant to the public interest as required by § 7(b) simply is an inadequate means to assure vindication of the transcendant interests of the public.

IV

It is appropriate to reiterate here the principle that guides our review of abandonment orders as stated in *Michigan Consolidated:*

> Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors.

Supra at 431, 283 F. 2d at 226.

We contemplate on remand, therefore, a searching and comprehensive inquiry by the Commission into all factors relevant to determining the overall public interest in this abandonment proceeding. For this purpose it will doubtless be necessary to supplement the record with additional evidence with respect to these factors. Primary importance must be given to a broadly conceived [13] comparison of the needs of the two natural gas

13. The Presiding Examiner noted that the Commission staff had proposed eleven criteria for comparing the needs of the two pipeline systems. Several of these were not considered because of insufficient evidence, difficulty of meaningful comparison or their speculative nature. Hilda B. Weinert, 49 FPC ——, —— (June

systems and the public markets they serve. Additionally, the Commission should consider the environmental effects of its decision (*See Arizona Public Service Co.* v. *FPC*, —— U. S. App. D. C. ——, —— F. 2d —— (No. 72-1636, July 30, 1973)), the economic effect on the pipelines and their consumers, the presumption in favor of continued service and the relative diligence of the respective pipelines in providing for adequate natural gas supplies.[14] As discussed previously, the Commission should also accord significant weight to Natural's contract rights that resulted from the 1958 Commission approved settlement agreement. For the purpose of judicial review it is, of course, essential that the Commission's findings with respect to the factors it considered in determining the public interest be apparent from its opinion.

We recognize that the balancing process we impose upon the Commission is a complex one, but we perceive no acceptable alternative that would guarantee that the public interest "will in no way be disserviced" in abandonment proceedings. Accordingly, the orders of the Commission are vacated, the parties are restored to the status quo ante,[15] and the case is remanded to the Commission for further proceedings not inconsistent with this opinion.

So ordered.

2, 1972) (Presiding Examiner's Initial Decision); J. A. at 55, 95. The Commission, of course, is not bound by these proposals, but it should exercise its expertise to insure that all relevant and meaningful indices of comparative need are considered.

14. A certain tension is created by the fact that the less diligent pipeline often might, by definition, have greater need for the contested gas supplies. Nevertheless, the more diligent pipeline should be favored if such preferential treatment would not be inconsistent with the overriding public interest in a particular case.

15. Delivery of the 81,000 Mcf per day of natural gas to Transco shall be restored as quickly as possible.

APPENDIX B

OPINION AND GRANTING CLARIFICATION AND DENYING REMAINING MOTIONS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 73-1410

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
THE BROOKLYN UNION GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MONSANTO COMPANY
CITY OF CHICAGO, A MUNICIPAL CORPORATION
MOBIL OIL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK

No. 73-1412

PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
THE BROOKLYN UNION GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MOBIL OIL CORPORATION
MONSANTO COMPANY
TRANSCONTINENTAL GAS PIPELINE CORPORATION
CITY OF CHICAGO, A MUNICIPAL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY

No. 73-1558

ASSOCIATED GAS DISTRIBUTORS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
NORTHERN ILLINOIS GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
MARATHON OIL COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK
TRANSCONTINENTAL GAS PIPELINE CORPORATION
CITY OF CHICAGO

No. 73-1575

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
NORTHERN ILLINOIS GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND
NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
ASSOCIATED GAS DISTRIBUTORS
PUBLIC SERVICE COMMISSION FOR THE
STATE OF NEW YORK
MOBIL OIL CORPORATION
MARATHON OIL COMPANY
CITY OF CHICAGO
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
INTERVENORS

On Motions for Clarification and Rehearing
and for Recall of Mandate and Stay of
Reissuance of Mandate

Decided November 21, 1973

Before WRIGHT, ROBINSON AND MACKINNON, *Circuit Judges.*

ORDER

On consideration of the petitions for clarification and for rehearing and of the motions for recall of mandate and for stay of reissuance of mandate, it is

ORDERED by the Court that the aforesaid petition for clarification is granted and the remaining motions are denied in accord with the Per Curiam opinion of this Court attached hereto, to be published at a later date.

Per Curiam.

PER CURIAM: Intervenor Natural Gas Pipe Line Company of America, in an emergency motion, has petitioned this court to clarify the opinion and order in the above captioned case, and to direct the Federal Power Commission on remand to allocate equitably the remaining supplies of natural gas in the La Gloria Field pending final disposition. It has also filed a petition for rehearing, a motion for recall of mandate and for stay of reissuance of mandate pending action on petition for rehearing. We clarify the opinion and order as hereinafter set forth but decline to enter any further directive to the Federal Power Commission.

The language of the opinion and order "the parties are restored to the status quo ante," as amplified by note 15, means that all parties are now restored to the respective daily volumes of natural gas to which they would have been entitled absent the grant of abandonment.

With respect to the slip opinion, page 12, footnote 15 is stricken and the following is inserted in lieu thereof:

> [15] Delivery of the daily volumes of natural gas to which Transco is entitled under the status quo ante shall be restored as quickly as possible.

The petition for rehearing, the motion to recall mandate and for stay of reissuance of mandate pending action on petition for rehearing are all denied.

Judgment accordingly.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 655

HILDA B. WEINERT AND JANE W. BLUMBERG, *et al.*	Docket Nos. G-2730, *et al.*

OPINION AND ORDER AUTHORIZING ABANDONMENT OF, AND ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR, THE SALE OF NATURAL GAS

Issued: March 21, 1973.

APPEARANCES

Roscoe C. Elmore and *R. D. Haworth* for Mobil Oil Corporation.

Edward H. Forgotson for Ruth Phillips Bisiker and Grampian Company Limited.

Richard F. Generally and *B. L. Allen* for Monsanto Company.

Charles E. McGee, John T. Ketcham, Robert J. Haggerty and *Edward J. Kremer* for Atlantic Richfield Company.

William A. Sackmann for Marathon Oil Company.

Clyde E. Willbern and *Jack L. Brandon* for Getty Oil Company.

William W. Brackett and *Raymond Petersen* for Natural Gas Pipeline Company of America.

Richard L. Curry and *Mark Goldstein* for the City of Chicago.

William E. Doyle and *David R. Frick* for Northern Illinois Gas Company.

Peter V. Fazio for Illinois Power Company.

William I. Harkaway and *Robert A. Froehlick* for Consolidated Edison Company of New York, Inc.

Richard M. Kates for The Clean Air Coordinating Committee.

Gerald D. Mindell for The Peoples Gas Light and Coke Company.

Frederick Moring, John E. Holtzinger, Jr. and *Denis Neill* for Associated Gas Distributors.

J. Harry Mulhern, James R. Lacey, Edward S. Kirby and *R. M. Nelson* for the Public Service Electric and Gas Company of New Jersey.

Thomas F. Ryan, Jr., Richard J. Connor, Robert G. Hardy, Lawrence H. Gall, William N. Bonner, Jr., and *R. V. Loftin* for Transcontinental Gas Pipe Line Corporation.

William J. Scott, Peter A. Fasseas and *Thomas Cassidy* for the Illinois Commerce Commission and the People of the State of Illinois.

Richaord A. Solomon and *Peter H. Schiff* for the Public Service Commission of the State of New York.

Joseph P. Stevens and *Barbara M. Gunther* for The Brooklyn Union Gas Company.

Dale A. Wright and *Clyde E. Willbern* for Piedmont Natural Gas Company, Inc.

Russell B. Mamone for the Staff of the Federal Power Commission.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

HILDA B. WEINERT AND JANE W. BLUMBERG, *et al.*	Docket Nos. G-2730, *et al.*

OPINION NO. 655

OPINION AND ORDER AUTHORIZING ABANDONMENT OF, AND ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR, THE SALE OF NATURAL GAS.

(Issued March 21, 1973)

MOODY, COMMISSIONER:

1. This case comes before us on exceptions to the Administrative Law Judge's Initial Decision issued on June 2, 1972, in which he found that the producer/applicants may not abandon the sale of natural gas from the La Gloria Field to Transcontinental Gas Pipeline Corporation (Transco), and obtain certificate authorization thereafter to sell these volumes of natural gas to Natural Gas Pipeline Company of America (Natural).

Initial Decision

2. In his Initial Decision, the Administrative Law Judge determined that, in a proceeding involving the potential abandonment of producer sales to one interstate pipeline company and the certification to another pipeline of the volumes of gas released by such abandonment, controlling weight must be given to the comparative needs of the competing pipelines. The Administrative Law Judge then found that, based on the evidence

developed on the record, Transco had shown the greater need for the gas and, accordingly, the abandonment of sales to Transco must be denied. For the reasons given below, we find that this decision is in error and must be reversed.

Exceptions

3. Natural, its supporting intervenors, and Staff except to the Initial Decision on the grounds that (1) the controlling factor should be the contracts executed by Natural and the producers as embodied in a 1958 settlement agreement approved by the Commission in Docket No. G-6810, *et al.*, 20 FPC 208, and (2) assuming *arguendo* that comparative needs is the proper standard, Natural, by a preponderance of the evidence, has shown the greater need for this gas.

4. Transco and its supporting intervenors generally agree with the Initial Decision, and except only to the Administrative Law Judge's finding that the record in this case is complete enough to determine the comparative needs of both pipelines. The Public Service Commission of New York (New York), although in agreement with the result, excepts to the finding in the Initial Decision that comparative need is the appropriate standard. New York asserts that substantial weight must be given to the statutory policy against disrupting continued service.

Discussion

5. The Administrative Law Judge dismissed the arguments of almost all of the parties that the standard of comparative need enunciated by the court in *Michigan Consolidated Gas Co.* v. *F. P. C.*[1] is not the applicable standard here, asserting that "no party has come forward with any test other than comparative need which would permit the Commission to discharge its statutory obligation." The Administrative Law Judge sought to

1. 283 F. 2d 204 (CADC, 1960), cert. denied, 364 U. S. 913 (1960).

apply the statutory standard under the Natural Gas Act (Act) as contained in Section 7(b), to the instant proceeding, and dealt only with the issue of whether "the present or future public convenience or necessity permit such abandonment."[2]

6. Our Staff argues that the Administrative Law Judge approached this case from the wrong direction, *i.e.*, he focused his attention entirely upon the abandonment issue and ignored the issue of whether the producers had shown a public convenience and necessity sufficient to warrant the certificating of these volumes to Natural.

7. In cases such as this, where a shift in interstate purchasers is proposed, Staff correctly apprehends that our decision must balance public convenience and necessity under two sections of the Natural Gas Act, Section 7(b) and Section 7(e). While abandonment is authorized under 7(b) if the public convenience and necessity "permits", certification under 7(e) follows a finding that the public convenience and necessity "requires" the proposed service. When we are called upon to decide a case involving both sections, we cannot lawfully apply one section, to the exclusion of the other.

8. The error implicit in deciding abandonment issues before determining the question of certification would be apparent in a case where abandonment is authorized, but certification is not. In such a situation, though the applicants sought to shift gas supplies from one to another interstate purchaser, the result would be a loss of the gas supply to the interstate market. This result can be avoided by first examining whether a certificate should issue, absent a claim of entitlement by another purchaser; if so, the question of abandonment can then be resolved with full assurance that the interstate market will be fully protected, regardless of the outcome of the abandonment case.

---

2. Natural Gas Act, 15 U. S. C. § 717 f(b).

The Natural Certificate Issue

9. Absent any claim of entitlement by Transco, should sale of this gas to Natural be certificated? The Administrative Law Judge found that Natural required no additional facilities to take the increased volumes of La Gloria Field gas. Transco excepts to this finding arguing that Natural has been able to meet substantially all of the requirements of its customers during the winter seasons 1971-1972 and 1972-1973. Under these circumstances, Transco argues that Natural either has excess winter capacity on its system, or intends to sell additional volumes of gas to its customers (for which there has been no application filed with the Commission), or must cut back on takes from other suppliers in order to take these additional volumes.

10. In response, Natural argues that it has sufficient system winter capacity to take all the La Gloria Field gas without selling additional volumes to its customers or cutting back its takes from other suppliers. Natural argues that the record shows that the maintenance of deliveries during the winters of 1971-1972 and 1972-1973 has been accomplished by retaining part of its storage capacity for its own use rather than allocating such capacity to its customers under its storage rate schedule.

11. The Administrative Law Judge correctly found that no additional facilities will be required for Natural to take the additional La Gloria Field gas and that the La Gloria Field gas will assist Natural in filling its main line facilities during winter periods with no cutbacks from other sources of supply. Natural's need for the La Gloria gas to meet existing sales commitments is clear.

12. The record further shows that the price to be paid for La Gloria Field gas will be the rates as prescribed in Opinion 595.[3]

---

3. *Area Rate Proceeding, et al.* (Texas Gulf Coast Area), 45 FPC 674 (1971).

13. Under traditional 7(e) standards, we find that certification of the proposed sales to Natural, is required by the public convenience and necessity.

Transco Abandonment Issue

14. The La Gloria producers seek to abandon sales to Transco, invoking Section 7(b) which provides:

> "No natural-gas company shall abandon . . . any service rendered by means of such [jurisdictional] facilities, without the permission and approval of the Commission first had and obtained, after due hearing and a finding that the available supply of natural gas is depleted to the extent that the continuation of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. 15 U. S. C. 717f(b)."

We agree with New York, Transco, and Transco's supporting intervenors that 7(b) expresses a statutory policy against disruption of existing service, but it is equally clear that disruption is to be permitted if the Commission finds (a) depletion of the available supply *or* (b) that the public convenience or necessity permit disruption.

15. We conclude that abandonment should be permitted and approved, basing our conclusion upon our finding that the public convenience and necessity permit abandonment. Our findings are impelled by the record before us.

16. Following establishment of La Gloria production in the mid-1940's, Transco entered into purchase agreements, the earliest dated in 1947. Thereafter, in 1950, Natural contracted to buy gas from the La Gloria producers.

17. In 1952 Transco and Natural were each purchasing gas produced in the La Gloria Field, Jim Wells and Brooks Counties, Texas. The sellers to Transco and Natural were the same. During 1953, the producers began to reduce the volume of their deliveries to Natural, provoking a dispute between the producers

and Natural as to whether the producers were delivering the appropriate quantities under their contracts to Natural. At that time, the contract quantity of Natural from the field was 85,000 Mcf per day. The producers contended that the field had inadequate deliverability to satisfy the contract entitlements of Transco and Natural and still meet the producer's need for gas for recycling and other operations.

18. While the dispute over deliverability was pending, the producers attempted to invoke an "escape clause" in their contracts with Natural by serving on Natural notices of termination of their contracts. In 1954 Natural filed complaints against the producers at Docket Nos. G-2950 and G-2951.

19. Transco petitioned to intervene in *Argo Oil Corp., et al.*, Docket No. G-2951, by filing dated November 29, 1954, and stated:

> "In view of the foregoing it is indisputably clear that Transcontinental may be deprived of a valuable contract right in total disregard of the administrative standards imposed by due process of law if the relief requested by Texas Illinois [Natural] is subsequently granted by the Commission without affording Transcontinental an opportunity to be heard and to participate in the proceedings." (Transco's Petition to Intervene in Docket No. G-2951, page 7.)

20. On January 10, 1955, the Commission issued orders to show cause against the producers at Docket Nos. G-6810 and G-6811. These four dockets were consolidated as *Argo Oil Corp., et al.* Transco was granted intervention in the consolidated proceeding (See 15 FPC at 603) and participated in the hearing held therein. On January 25, 1956, the Commission affirmed the Initial Decision of the presiding Administrative Law Judge which had held against the producers. (15 FPC 622.) The producers appealed to the United States Court of Appeals for the Fifth Circuit. During 1958, while the appeal was pending, the parties agreed to a settlement.

21. The 1958 settlement was embodied in the February 15, 1958, amendment to the January 25, 1950, contract between Natural and the producers. This amendment reduced Natural's contract right to purchase from this field from 85,000 Mcf per day to 35,000 Mcf per day with provision for subsequent increases and changed the term of the contract to a life of lease or of reserves contract. Transco's contract was to be unaffected.

22. We believe the fair import of the settlement to be that Transco was to continue to get its 81,000 Mcf/day until its contract expired in 1971, and abandonment of the producer-Transco sale was permitted, and Natural was to get all gas the field could produce, other than that sold to Transco and others under then existing contracts.

23. On July 14, 1958, a "Joint Motion for an Order Approving Agreement Terminating Issues and Dismissing Proceeding" was filed in *Argo Oil Corp., et al.,* Docket Nos. G-6810, *et al.* This pleading sought Commission approval of the settlement and stated:

> "The Amendment *inter alia* extends the term of the contract, thereby ultimately making available to Texas Illinois [Natural] a larger quantity of gas, and eliminates the escape clause under which Sellers heretofore gave notice of termination.
>
> * * * * *
>
> [Approval of the settlement agreement would] assure to the pipeline purchaser [Natural], its distributor customers and the public served by those distributors the continuation of the contract and a supply of gas, to be available over a period of time considerably in excess of that covered by the original contract, thus permitting a more orderly protection of future services." (Joint Motion at pp. 5-6.)

On August 15, 1958, the Commission accepted and approved the settlement, and dismissed further proceedings, stating:

> "These negotiations have resulted in the execution of a settlement agreement, dated February 15, 1958, which is

in the form of an Amendment to the 1950 contract. The Amendment, *inter alia*, revises volumetric obligations and extends the term of the contract, thereby ultimately to Texas Illinois a larger quantity of gas . . ." (20 FPC at 209.)

24. Against this background, we believe the public convenience and necessity permits abandoment. The 1958 settlement cannot be effectuated if we reach a contrary conclusion, and we are obligated to give effect to that settlement which we approved as being in the public interest. *Cf. Cities Service Gas Co.*, 38 FPC 364 (1967); *Texas Eastern Transmission Corp.* v. *F. P. C.*, 306 F. 2d 345 (CA5, 1962); *City of Chicago* v. *F. P. C.*, 385 F. 2d 629 (CADC, 1967); *Continental Oil Co.* v. *F. P. C.*, 373 F. 2d 96 (CA10, 1967). In the settlement bargain approved by the Commission in 1958, Natural and its customers gave up their claim to large volumes of gas from the La Gloria Field from the date in 1953 when Natural's purchases were reduced by the producers, and Natural received in exchange the rights to purchase additional volumes in the future as they became available (when cycling was completed in various reservoirs from time to time and when other gas purchase contracts, including Transco's expired). The producer/applicants bargained for the converse, thus avoiding a situation in which they felt they could not deliver the full stated contract quantities to all purchasers from the field at any one time. Transco, which was a party, was able to assure it would be able to take its full contract quantity for the life of its contract, even though Natural's quantity was cut for that period. Transco raised no objections to the settlement. [The bargain, when made, was in the public interest and it is no less so today.]

25. Transco argues that the public convenience and necessity aspects of this abandonment application should be judged in the light of Natural's failure to prove that its needs for this gas outweigh the needs of the existing buyer. New York argues that public convenience and necessity should be judged against a standard of refusing disruption of existing service where the

existing buyer has a demonstrable need for continued service. The Administrative Law Judge weighed comparative needs and determined that Transco has a greater present need for La Gloria gas than Natural. All three approaches to this case suffer a common failing: (They preclude consideration of the totality of "public convenience and necessity" which is ours to weigh.) It goes without saying that comparison of pipeline needs in times of shortage is a prodigious undertaking.) The defects in this standard are for more substantive, however, than the degree of difficulty in its application.

26. It is essential that the pipeline industry be able to plan and execute long-range gas supply acquisition programs. The failure to honor contracts for additional gas supplies would be disastrous since no pipeline would be able to plan for the future. There must be reasonable assurance that once an individual pipeline contracts for gas supplies, as Natural did in 1958, it may expect that contract to be fulfilled. In the first instance, the pipeline can contract for the life of the lease or for a fixed term with additional pre-emptive rights. Transco did not do so.

27. We should not be understood to say that, in all instances, the pipeline which contracts for a future gas supply will necessarily prevail over the pipeline which does not. There may be circumstances where rigid adherence to this approach would create emergencies of critical magnitude. We have examined this record to see if this is such a case.

28. In the instant proceeding Transco had the opportunity to show that there exists an unequivocal public necessity for abrogation of the Natural contract and extension of the Transco contract beyond its fixed term. We find no compelling proof that Transco's contract rights should be enlarged to include the right to continued service, nor do we find proof that the producer contracts with Natural should be disregarded. It is essential to the efficient operation of the gas industry that it be allowed to discharge its public service obligations in an orderly manner.

Certainty of contract rights cannot be absolute within a regulatory structure which calls for our review of such contracts for consistency with the public interest. We should not, however, add to that uncertainty when to do so will ultimately redound to the detriment of the industry we regulate and the customers it serves. "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin Area Rate Cases,* 390 U. S. 747, 822 (1968).

29. This is not to suggest that we will permit the abandonment of sales of gas to the interstate market in order to honor a contract for its sale in the intrastate market. Nor do we here suggest that we will countenance a switch in interstate purchasers which results from a "pirating" of supply sources. We do express our intent to facilitate the orderly functioning of the interstate pipeline industry and to disrupt that orderly functioning only when substantial emergencies dictate that we must.

30. Pipelines should be encouraged to manage their independent gas supply acquisition programs with as little external interference as the public convenience and necessity permit. We will not retrospectively substitute our judgment in the contracting process without a showing of unequivocal public necessity.

31. In the instant proceeding, both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to either pipeline will result in a diminution of its ability to continue even current levels of service. Under these circumstances, we find no showing of unequivocal public necessity for abrogating the contracts of the parties.

Gas Delivered to Transco After the Expiration of its Contract

32. Natural argues that after the expiration of Transco's contracts with the producers, all of the La Gloria Field gas should have been delivered to Natural and that Transco has wrongfully taken gas which now should be repaid. We reject this argument. Natural acquired no rights to the La Gloria gas unless and until certification of the sale to it and abandonment of the Transco sale is authorized by this Commission. We do, however, put Transco on notice that continued takes of gas from the La Gloria Field producers after the issuance of this order will be subject to pay-back. Since the parties must rearrange operations consistent with this order, we will provide approximately 30 days in which to complete abandonment of sales to Transco and the sale of those volumes to Natural.

Non-Contested Delieries

33. Getty Oil Company, Monsanto Company, *et al.*, and Marathon Oil Company contracted on July 13, 1970, to deliver 40,000 Mcf/d of gas to Natural, gas which consists in part of gas previously sold intrastate to Celanese Corporation and gas available as a result of reduced cycling (Docket No. G-3732, applications filed February 25, 1971). By order entered May 24, 1971, the Commission granted these applications but, due to subsequently discovered procedural defects, the Commission rescinded the certificate (except those of Mobil Oil Corporation and Atlantic Richfield) by order entered July 21, 1971. In a separately filed brief Getty requests that the certificates be reissued and asserts in support thereof that these portions of the applications are not contested and do not involve gas which was dedicated to Transco. No one contests these allegations nor opposes granting the applications. The Administrative Law Judge found, therefore, that the present and future public necessity and convenience require the sale by those producers not

yet certificated of that portion of 40,000 Mcf/d of gas sold to Natural Gas Pipeline Company by contracts dated July 13, 1970, and that an appropriate order should be entered. We affirm this portion of the Initial Decision.

The Commission further finds:

(1) Producer/applicants are engaged in the sale for resale of natural gas in interstate commerce subject to the jurisdiction of the Commission and each is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission.

(2) The sales of natural gas hereinbefore described, as more fully described in the applications in this proceeding, will be made in interstate commerce subject to the jurisdiction of the Commission; and such sales by producer/applicants, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of Section 7(e) of the Natural Gas Act.

(3) Producer/applicants are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules, and regulations of the Commission thereunder.

(4) The sales of natural gas by producer/applicants are required by the public convenience and necessity and a certificate therefor should be issued as hereinafter ordered.

The Commission orders:

(A) That producer/applicants be hereby authorized and directed to abandon and discontinue sales of natural gas in the amount of 81,000 Mcf/day from the La Gloria Field area to Transco as of April 18, 1973, in the amounts set forth in their applications.

(B) That certificates of public convenience and necessity are issued to Getty Oil Company (Docket No. G-3732), Mon-

santo Oil Company (Docket No. G-9357), and Marathon Oil Company (Docket No. G-11818) for the reasons given therefor and as ordered by the Administrative Law Judge in his Initial Decision, to become effective on the date of issuance hereof.

(C) That certificates of public convenience and necessity are issued to the producer/applicants authorizing the sale on and after April 18, 1973, of an additional 81,000 Mcf/day of natural gas from the La Gloria Field, in the amounts set forth in their applications, to Natural.

(D) From and after April 18, 1973, any further volumes of natural gas taken by Transco from the producer/applicants from the La Gloria Field shall be repaid to Natural.

(E) The Administrative Law Judge's decision issued in this proceeding on June 2, 1972, to the extent it is inconsistent with this order is reversed and set aside. Exceptions to the Administrative Law Judge's decision not granted herein are denied.

By the Commission:

KENNETH F. PLUMB,

(SEAL) *Secretary.*

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

HILDA B. WEINERT and JANE W. BLUMBERG, *et al.*	Docket Nos. G-2730, *et al.*

ORDER DENYING REHEARING AND PARTIAL STAY

(Issued April 18, 1973)

Applications for rehearing of Opinion No. 655 in the above-styled proceedings were filed by Transcontinental Gas Pipe Line Corporation (Transco), Natural Gas Pipeline Company of America (Natural), Consolidated Edison Company of New York, Inc., The Public Service Commission of the State of New York (New York) and Associated Gas Distributors.

With but one exception the applications for rehearing are restatements of positions of the parties previously advanced in briefs to the Administrative Law Judge and to the Commission on exceptions to the Initial Decision, presenting no new facts nor points of law not considered by the Commission. In addition to a restatement of its position previously taken, Transco seeks a partial stay of Opinion No. 655 in which the Commission would impose upon Natural an obligation to account for and repay Transco at the rate of 81,000 Mcf per day all gas taken from and after April 18, 1973, in the event the Commission's Opinion is reversed, remanded, or otherwise overturned upon appeal. Transco indicates that it would not expect to be able

to "keep" any volumes received from and after April 18, 1973, if the Commission's decision is ultimately upheld; and since Transco would be in no position to pay back volumes in such event, it is not requesting a complete stay. Natural opposes the granting of the partial stay sought by Transco on the grounds that it too would be in no position to repay volumes taken in the event Opinion No. 655 is reversed, and that the granting of such partial stay will mean that neither company can afford to take this gas pending ultimate determination of this proceeding.

We would consider the granting of a partial stay as requested by Transco only upon a showing of the likelihood of Transco's prevailing upon appeal.[1] Transco has made no such showing.

Upon review of Opinion No. 655 and the applications for rehearing, it appears that we may not have adequately disposed of the argument that *Michigan Consolidated Gas Co.* v. *F. P. C.*, 283 F. 2d 204 (CADC, 1960), *cert. denied*, 346 U. S. 913 (1960), sets the appropriate standard to be used in this case.

First, it must be observed that *Michigan Consolidated* was decided in the context of a request by a pipeline (Panhandle) that it be permitted to abandon sales to a distributor, with the released volumes then to be used by Panhandle in its own marketing program. The case dealt with gas supplies, which, whether marketed by the pipeline or the distributor, would be devoted to increased service. This was the very reason the Commission used a comparative space heating saturation test, a test appropriate only to projected load growth on one system at the expense of growth on another system. *Michigan Consolidated* dealt with a different kind of abandonment case than the one before us.

Secondly, neither the Commission, nor the Circuit Court, attempted to establish in *Michigan Consolidated* a single standard by which all abandonment cases are to be judged. The

1. *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (CADC, 1958).

Commission applied certain tests it then found to be appropriate, and the reviewing Court approved the use of those tests. The Court did not bind the Commission to use of the same criteria in judging future, dissimilar cases.

It must also be observed that the Commission in *Michigan Consolidated* determined that the present or future public convenience or necessity permitted the abandonment sought by Panhandle after applying three standards—not just comparative needs as we are urged to do here. On the basis of those standards, as they were used by the Commission and the Court in *Michigan Consolidated*, "greater advantage" has not been shown to either company in these proceedings and cannot be shown.

Finally, *Michigan Consolidated* did not involve an antecedent settlement which was approved by the Commission and which was inextricably interwoven into the abandonment problem. As stated in Opinion 655, we find it in the public interest to give effect to that settlement.

New York again urges that continuity of service is the very purpose for which Section 7(b) of the Natural Gas Act was promulgated. While we agree with this standard in principal, we cannot accept the parochial application urged by New York. Our responsibilities extend to the entire public interest not merely to a segment thereof. As indicated in Opinion No. 655:

> "In the instant proceeding, both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to either pipeline will result in a diminution of its ability to continue even current levels of service."

We think the court in *Michigan Consolidated, supra,* at 214, correctly states the standard to be applied in abandonment cases:

> "An applicant for abandonment under § 7(b) of the Act has the burden of making the factual showing which will assure the Commission, charged with protecting the public interest, that that interest will in no way be disserved . . ."

Applicants have shown that the *overall* public interest would be disserved by denial of the abandonment sought in these proceedings. Transco and its supporting interveners have presented no unequivocal public necessity overriding that showing.

The Commission orders:

Applications for rehearing and partial stay are denied.

By the Commission.

KENNETH F. PLUMB,
Secretary.

(SEAL)